mandatory provision of the statute which vests the district attorney with the duty to prosecute paternity actions was intended to provide counsel for the mother at the expense of the state as well as to protect the state's interest in preventing the child from becoming a public charge. The statute was not intended to deprive the mother of any of her interests in the proceeding.[7]

In *Harley v. Ionia Circuit Judge*, 140 Mich. 642, 104 N.W. 21, 22 (1905) the Michigan Supreme Court interpreted a similar statute [Mich.Comp.Laws § 2556][8] The statute required prosecuting attorneys to appear in all civil or criminal cases in which the state or county had an interest. The court said:

> " The statute wisely provides against the contingency of such a child becoming a public charge, but it recognizes that the complainant is interested, and must also be protected. To properly protect the interests of a minor under such circumstances by the employment of counsel would appear not only to be a right, but the duty, of a parent or guardian. The prosecuting attorney representing the people and the attorney representing the complainant do not represent conflicting interests, nor is the complainant's attorney in any sense an assistant prosecutor. "

The defendant has failed to cite a case in point to support his contention and our research has revealed only contrary authority. We hold that: it was the legislative intent that the district attorney control and prosecute paternity proceedings, this duty cannot be relinquished in favor of private counsel; under the facts of this case, the mother-complainant was entitled to representation by private counsel, and there was no showing of prejudice to the appellant.

AFFIRMED.

All the Justices concur.

Harley v. Ionia Circuit Judge, 140 Mich. 642, 104 N.W. 21 (1905).

See also Uniform Parentage Act § 19 which permits each party to be represented by counsel regardless of financial circumstances.

7. See *State v. Chicko*, *id.*; *State v. Sax*, *id.*

Robyn LeRoy PARKS, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-79-3.

Court of Criminal Appeals of Oklahoma.

Aug. 26, 1982.

Rehearing Denied Sept. 28, 1982.

Defendant was convicted in the District Court, Oklahoma County, Joe Cannon, J., of murder in the first degree and he appealed. The Court of Criminal Appeals, Brett, P.J., held that: (1) defendant was not entitled to instruction on lesser included offense of second-degree murder; (2) trial court properly admitted tape recordings of conversation between defendant and another person; (3) corpus delicti was sufficiently established to permit introduction of confession; (4) trial court's voir dire of jurors concerning death penalty was proper; (5) trial court's instruction on the death penalty were proper; and (6) evidence sustained jurors' determination that the murder was committed to avoid arrest or prosecution.

Affirmed.

1. Criminal Law ⇐795(2)

Defendant is entitled to have an instruction on a lesser included offense where the evidence warrants it.

2. Homicide ⇐285

Tape recorded statement in which defendant indicated that he had been attempting to use fraudulent credit card to purchase gasoline when he killed the service

8. The Michigan statute, Mich.Comp.Laws § 722.714(c), was last amended in 1962 and it now requires the mother to employ private counsel unless she is eligible for public assistance.

station attendant was insufficient, by itself, to warrant instruction on second-degree murder on theory that defendant had murdered the victim while committing the felony of using a fraudulent credit card. 21 O.S. 1981, §§ 701.8, subd. 2, 1550.22.

3. Criminal Law ⇐563

State must prove the corpus delicti beyond a reasonable doubt by evidence other than a confession.

4. Criminal Law ⇐563

The "corpus delicti" is the actual commission of a particular crime by someone; it may be established without showing that the offense charged was committed by the accused.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐517.3(4)

Testimony of police and medical examiner to the effect that victim had been found shot to death was sufficient to establish corpus delicti of homicide so as to render defendant's confession admissible.

6. Criminal Law ⇐814(17)

Tape-recorded conversations in which defendant admitted that he committed the crime provided direct evidence linking defendant to the crime so that trial court was not in error in limiting circumstantial evidence instruction to the issue of malice aforethought.

7. Criminal Law ⇐824(9)

When evidence is both direct and circumstantial, it is not error to fail to give circumstantial-evidence instruction when none is requested.

8. Jury ⇐131(17)

Trial court which asked jurors whether they could impose the death penalty without doing violence to their conscience if the law and evidence warranted the death penalty, which asked any juror who responded in the negative whether reservations about the death penalty were such that, regardless of the law, the facts and the circumstances, he would not inflict the death penalty and which dismissed jurors who responded in the affirmative to the second question properly questioned the jurors on that issue.

9. Jury ⇐33(2.1)

Dismissal of jurors who said that they could not impose the death penalty without doing violence to their conscience and that they would not inflict the death penalty regardless of the law, the facts and the circumstances of the case did not deny defendant a jury representing a cross section of the community.

10. Jury ⇐108

Sentence of death cannot be carried out if jury which recommends it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

11. Criminal Law ⇐789(2)

Trial court which told the jury that no one was going to tell them what reasonable doubt was, that there was a higher degree of proof required in a criminal case than in a civil case, and that the preponderance of the evidence standard did not apply did not improperly attempt to define reasonable doubt.

12. Criminal Law ⇐394.3

One who voluntarily enters into a conversation with another takes a risk that that person may record the conversation and the prohibition against unreasonable searches and seizures did not prevent admission of tape conversations into evidence where one party consented to the taping. U.S.C.A.Const.Art. 2, § 30.

13. Witnesses ⇐337(6)

Where there had never been a determination that defendant's prior robbery conviction was unconstitutionally obtained, defendant could not collaterally attack that conviction when it was offered to impeach him at his subsequent murder trial. 12 O.S. 1981, § 2609; 22 O.S. 1981, § 1080 et seq.

14. Criminal Law ⇐1030(1)

Absent fundamental error, Court of Criminal Appeals will not consider allegations of error not objected to at trial.

15. Criminal Law ⇐986.6(3)

Photograph of victim at the scene of the crime was properly offered during the sentencing phase in order to prove the aggravating circumstance that the offense was especially heinous, atrocious and cruel.

16. Criminal Law ⇐728(5)

When an objectionable statement is made by a prosecuting attorney, defense counsel must object and request that the jury be admonished to disregard that statement; if that is not done, defendant is deemed to have waived any objection unless the remarks are fundamentally prejudicial.

17. Criminal Law ⇐1177

Prosecuting attorney's closing argument during the sentencing phase to the effect that he could not find a single, solitary mitigating circumstance that would offset any of the aggravating circumstances was not fundamentally prejudicial.

18. Criminal Law ⇐1208(1)

If jury does not find unanimously beyond a reasonable doubt that one or more of the statutory circumstances existed, they are not authorized to consider the penalty of death and the sentence would automatically be imprisonment for life.

19. Criminal Law ⇐986.6(1)

Trial court's instruction in sentencing phase to effect that the jurors were to avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence did not nullify the trial court's instruction concerning mitigation.

20. Criminal Law ⇐986.6(1)

Jury is not required to recommend death even if it finds one or more aggravating circumstances have been established beyond a reasonable doubt. 21 O.S. 1981, § 701.11.

21. Criminal Law ⇐1206(1)

Oklahoma death penalty statute does not unconstitutionally shift the burden of proof to the defendant to prove sufficient mitigating circumstances to outweigh the aggravating circumstances.

22. Criminal Law ⇐986.6(1)

Trial court properly instructed jury at sentencing phase that they were authorized to consider all the evidence presented throughout the trial in determining what sentence defendant should receive.

23. Criminal Law ⇐986.6(3)

Evidence of tape recording on which defendant stated that he killed gas station attendant because he was afraid the gas station attendant would report him to the police for using a stolen credit card clearly established the defendant's state of mind and was sufficient evidence on which jury could find the aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

24. Criminal Law ⇐1206(1)

Oklahoma death penalty statute is not unconstitutional on theory that the state has failed to show that the state's interest involved could not be gratified by less drastic means.

25. Criminal Law ⇐1213

Oklahoma death penalty statute does not inflict cruel or unusual punishment.

26. Criminal Law ⇐1206(2)
Homicide ⇐354

Sentence of death imposed upon defendant who was convicted of killing gas station attendant and found to have done so in order to avoid arrest or prosecution for using a stolen credit card was not imposed under the influence of passion or prejudice and was not excessive or disproportionate to the penalty imposed in similar cases. 21 O.S. 1981, § 701.13.

An appeal from the District Court, Oklahoma County, Joe Cannon, District Judge.

Robyn LeRoy Parks, appellant, was convicted of Murder in the First Degree in Oklahoma County District Court, Case No. CRF 77 3159. He was sentenced to death and appeals. AFFIRMED.

Robert A. Ravitz, Asst. Public Defender, Oklahoma City, for appellant.

Jan Eric Cartwright, Atty. Gen., State of Oklahoma, Susan Talbot, Asst. Atty. Gen., Chief, Appellate Criminal Division, Oklahoma City, for appellee.

OPINION

BRETT, Presiding Judge:

Robyn LeRoy Parks was found guilty of Murder in the First Degree pursuant to Laws 1976, ch. 1, § 1, now 21 O.S.1981, § 701.7 in the District Court of Oklahoma County, Case No. CRF 77 3159. Subsequent to a hearing on aggravating and mitigating circumstances, the jury voted to impose the death penalty.

At approximately 4:30 a. m. on August 17, 1977, the victim, Abdullah Ibrahim was found shot to death on the floor of the Gulf Service Station where he was employed. An unused charge slip bearing various notations on both the front and back, which was apparently used as a scratch pad to compute the customers' purchases and figure tax, was found at the scene of the homicide by an investigating police officer. This same charge slip also had a license tag number written across the front of it, XZ-5710. It was subsequently determined that the owner of the vehicle bearing that license tag number was Robyn LeRoy Parks.

On August 29 and 30, 1977, James Clegg, an informant, allowed representatives of the State to tape two phone conversations that Clegg had with the appellant who was then in San Pedro, California. During the course of the August 29th telephone conversation, Parks told Clegg that he shot Abdullah Ibrahim because Ibrahim had written down his tag number and Parks was afraid Ibrahim would call the police when he realized Parks' credit card was hot. During the August 30th phone conversation, Parks revealed the location of the gun that he used to shoot the victim. At that location, a .45 calibre pistol in a holster and a box of .45 calibre ammunition was found by Clegg who was accompanied by a police detective.

Robyn Parks testified in his own defense that the answers he gave on the two tapes were not true, that he had made the incriminating statements in order to protect his family from further harassment. He claimed that on an earlier day he had obtained gas at the station and because he did not have the money with which to pay, the attendant wrote down his license tag number. He returned the same night to pay for the gas. He further testified that on the night of the murder, he had stayed at the home of Elaine Sheets.

During the second stage of the trial, the State offered three aggravating circumstances to justify imposition of the death penalty. In mitigation, the State offered the testimony of Robyn Parks' father. The jury found one aggravating circumstance, that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

Error is first alleged in the trial judge's refusal to allow an instruction on the offense of Murder in the Second Degree pursuant to Laws 1976, ch. 1, § 2, now 21 O.S.1981, § 701.8(2). The desired instruction would have allowed the jury to determine, based on the evidence, that the appellant murdered the victim while the appellant was committing the felony of using a fraudulent credit card in violation of Laws 1981, ch. 86, § 4, now 21 O.S.1981, § 1550.22.

[1] Both parties agree that a defendant is entitled to have an instruction on a lesser included offense where the evidence warrants it. *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); 22 O.S.1971, § 916. The trial court determined as a matter of law that the evidence was insufficient in the present case to allow the jury to find that the appellant was using a fraudulent credit card, thus there could be no justification for a finding of second degree murder.

[2] The sole evidence offered to the jury to support a finding that the appellant was using a fraudulent credit card was the appellant's own statement made during the tape recorded conversation with the informant, Clegg. Aside from that statement,

no other evidence was ever introduced to show credit card use, such as a credit card receipt for gasoline, or any evidence of a credit card or of missing gasoline.

We agree that the trial judge was correct in not allowing an instruction on second degree murder. Judge Cannon stated:

> As a matter of fact, the defendant's own testimony was that he didn't even own a credit card. But even in the State's case there was no evidence of a credit card, except his statements and his statement alone does not prove the corpus delecti of the crime. There is no corpus delecti of any other felony having been committed.
>
> There is no evidence of it and, consequently, it's Murder One or nothing. (Tr. 543)

See also, *DeLaune v. State*, 569 P.2d 463 (Okl.Cr.App.1977) quoting *Hall v. State*, 538 P.2d 1113, 117 (Okl.Cr.App.1975):

> The general rule is that in every criminal prosecution the burden rests on the State to prove the corpus delecti beyond a reasonable doubt. This must be proven by evidence other than a confession, the confession being admissible merely for the purpose of connecting the accused with the offense charged.

Because there was no evidence to support a lower degree of the crime charged or an included offense, it was not only unnecessary to instruct on second degree murder, but the court had no authority to ask the jury to consider the issue. *Irvin v. State*, 617 P.2d 588 (Okl.Cr.App.1980), *Rogers v. State*, 583 P.2d 1104 (Okl.Cr.App.1978).

[3] In a supplemental brief, the appellant alleges that his conviction for first degree murder cannot be sustained for the reasons that his tape recorded statements were not corroborated by independent proof of the corpus delecti. We agree, as we have already stated, that the State must prove the corpus delecti beyond a reasonable doubt by evidence other than a confession. *DeLaune v. State*, supra. The appellant acknowledges that evidence introduced by the State established that a homicide was committed, but argues there was insufficient proof of the corpus delecti to corroborate his confession since no evidence was presented connecting him with the actual commission of the offense independent of his statements.

[4] This contention misconstrues the definition of corpus delecti and the extent of the proof the State introduced to connect the appellant to the crime. The "corpus delecti" means the actual commission of a particular crime by someone. *Bond v. State*, 90 Okl.Cr.App. 110, 210 P.2d 784 (1949). The corpus delecti may be established without showing that the offense charged was committed by the accused. *Webb v. State*, 550 P.2d 1360 (1976).

[5] In the present case, the testimony of the police and the medical examiner established that a homicide was committed, and the State therefore clearly established the corpus delecti by evidence independent of appellant's statements. Further evidence introduced by the State in the form of the credit card slip bearing the appellant's license tag number was sufficient to link the appellant to the corpus delecti of the crime. We therefore conclude that the evidence is sufficient to sustain the conviction and this proposition is without merit.

[6] Secondly, the appellant contends that the trial court committed fundamental error by limiting the circumstantial evidence instruction to cover only the issue of malice aforethought. He argues that because there was a complete lack of any direct evidence to show he was connected to the crime, a general circumstantial evidence instruction should have been given. However, the tape-recorded conversations introduced at trial, in which the appellant admitted that he committed the crime, provided direct evidence linking the appellant to the crime.

[7] Also, no objection was made at the time the instructions were given, nor was an alternative instruction offered. When the evidence is both direct and circumstantial, it is not error to fail to give a circumstantial evidence instruction when none is requested. *Grimmett v. State*, 572 P.2d 272

(Okl.Cr.App.1977). Therefore, the trial court did not commit error by failing to provide a general circumstantial evidence instruction.

The third and fourth propositions of error contend that the trial court violated the appellant's Sixth and Fourteenth Amendment rights by excusing six jurors for cause because of their opposition to the death penalty. It is first alleged that the trial court failed to fully inquire of these six jurors whether they could consider the death penalty as required by the juror's oath. The appellant argues that this failure to inquire violated the holding of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). There, the United States Supreme Court recognized that the State might not exclude jurors because of their views on the death penalty unless " they could never vote to impose the death penalty or they would refuse even to consider its imposition in the case before them." 391 U.S. 510, at 512, 88 S.Ct. 1770 at 1772.

[8] In the present case, the trial judge asked each juror the following question:

> In a case where the law and evidence warrant, in a proper case, could you without doing violence to your conscience, agree to a verdict imposing the death penalty?

If a juror responded in the negative, the judge would then ask:

> If you found beyond a reasonable doubt that the defendant was guilty of murder in the first degree and if under the evidence, facts and circumstances of the case, the law would permit you to consider a sentence of death, are your reservations about the death penalty such, that regardless of the law, the facts and circumstances of the case, you would not inflict the death penalty.

If a juror answered yes to this, then the trial judge excused that juror for cause. It is our determination that this line of questioning and the resulting dismissal for cause did not violate *Witherspoon*. The trial court's questioning resulted in the determination that the juror, regardless of the law, facts or circumstances would never inflict the death penalty and this is exactly what the Supreme Court in *Witherspoon* held to be the correct standard to allow dismissal of a juror for cause.

[9] The appellant also claims that the dismissal of these six jurors denied him a jury which represented a cross section of the community.

[10] He cites *Witherspoon*, supra, to support the contention that it is the proper duty of the jury to express community attitudes about punishment. The appellant is correct that *Witherspoon*, supra, does stand for the proposition that a sentence of death could not be carried out where the jury that recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. However, the Supreme Court in that case determined that the appellant's right to representation by a fair cross-section of the community stopped there and did not extend so far as to require the inclusion of persons on the jury who could never vote to impose the death penalty or would refuse even to consider its imposition. Therefore, the appellant's argument is without merit.

The appellant claims in his fifth proposition of error that during voir dire, the trial court while trying to explain the difference between a civil case and a criminal case, defined reasonable doubt. The judge stated:

> No one's going to tell you what reasonable doubt is. Its got to be beyond a reasonable doubt. There's a higher degree of proof required in a criminal case before you could find someone guilty than in a civil case. Go back to those scales, ladies and gentlemen. If you have those scales that are even, and in a civil case you tip them in favor of the plaintiff by preponderance of the evidence. But in a criminal case, there has to be a greater one. Exactly where, is up to you, but you have to be beyond a reasonable doubt before you can find a defendant

guilty. That's the law of all fifty states. That's the law of Oklahoma and the Federal government.

[11] This Court has repeatedly held that an attempt to define "reasonable doubt" to a jury by the trial judge is reversible error. *Jones v. State*, 554 P.2d 830 (Okl.Cr.App. 1976). However, nowhere in the remark of which the appellant complains did the trial court actually give a definition of "reasonable doubt." Therefore, no error occurred. See, *Miller v. State*, 567 P.2d 105 (Okl.Cr. App.1977).

[12] Next, the appellant asserts two errors occurred with respect to the taped telephone conversations admitted into evidence. He argues that the Oklahoma constitutional provision, Article II, § 30, against unreasonable searches and seizures prevents the admission of taped conversations into evidence even though one party consented to the taping. He further alleges, that it was error for the jury to have been provided also with typewritten copies of the tape recorded conversation because this resulted in a violation of the "best evidence" rule.

We cannot agree with either contention. One who voluntarily enters into a conversation with another takes a risk that that person may record the conversation. Once one party consents to record a conversation, the conversation is divested of its private character. *Pearson v. State*, 556 P.2d 1025 (Okl.Cr.App.1976). We therefore conclude that because Mr. Clegg consented to the taping of the conversations, no violation of the appellant's right to privacy as contemplated by Article II, § 30 of the Oklahoma Constitution occurred.

In addition, the jury did listen to the actual tapes made of the conversations, therefore the "best evidence" rule, 12 O.S. 1981, § 3001, was not violated. The appellant has cited no relevant authority for his assertion that it was error for the jury to also receive typed copies of the conversations on the tapes, for this reason, the alleged error will not be considered. *Dick v. State*, 586 P.2d 1265 (Okl.Cr.App.1979).

When the appellant was seventeen years old, he was convicted of Robbery by Force or Fear. In proposition of error number nine the argument is made that the State should not have been allowed to use this prior conviction to impeach the appellant because the appellant had not been certified to stand trial as an adult before he was convicted.

[13] A determination that the prior robbery conviction was unconstitutionally obtained has never been made, nor is this the proper place for the appellant to collaterally attack that conviction. See 22 O.S. 1981, §§ 1080 et seq. Therefore, no error occurred when the State used the appellant's prior conviction for purposes of impeachment pursuant to 12 O.S.1981, § 2609.

Following the jury's determination that the appellant was guilty of Murder in the First Degree, a separate sentencing proceeding was held in accordance with 21 O.S.1981, § 701.10. The remaining part of this opinion concerns error that allegedly occurred during this second portion of the trial.

[14] It is first argued that error occurred when the court allowed William David Boren and William Boren to testify about the specific facts concerning the defendant's conviction for Robbery by Force and Fear and to identify a picture of William David Boren as being the picture of his face after he was beaten by Parks during the robbery. The appellant asserts that this testimony was outside the scope of rebuttal and introduced solely to effect the passions and prejudices of the jury. However, no objection was made at any time by defense counsel to the presentation of this evidence. Absent fundamental error, this Court will not consider allegations of error not objected to at trial. *Gaines v. State*, 568 P.2d 1250 (Okl.Cr.App.1977).

[15] Next, the appellant asserts that the admission of a photograph of the victim at the scene of the crime was error because it may have been the cause of the jury's returning the death penalty. This picture

was admitted during the second stage of the proceeding in order to prove the aggravating circumstance that the offense was especially heinous, atrocious and cruel. This Court has repeatedly said that when the probative value of a picture is outweighed by its prejudicial impact on the jury it will not be permitted into evidence. *Oxendine v. State*, 335 P.2d 940 (Okl.Cr.App.1958). Further, the weighing of these factors is left to the sound discretion of the trial court and absent an abuse of discretion it will not be disturbed on appeal. *Boling v. State*, 341 P.2d 668 (Okl.Cr.App.1959). The photograph was relevant to the issue for which it was introduced. In view of the fact that the jury, after viewing the photo, failed to find the aggravating circumstance that the crime was especially heinous, atrocious and cruel, no abuse of discretion is apparent.

Third, the appellant alleges that the prosecutor made improper remarks during the closing argument that denied the appellant a fair trial. The appellant complains that the prosecutor interjected his personal opinion when he stated: "So looking at it from both sides, I can't find a single, solitary mitigating circumstance that would offset any of the aggravating circumstances." Further, it is argued the prosecutor committed error by stating that in assessing the death penalty each juror was not personally putting Robyn Parks to death, by commenting on how the death penalty is effectuated in Oklahoma County, by telling the jury to leave sympathy, sentiment and prejudice out of their deliberation and by commenting on the deterrent value of the death penalty.

[16, 17] We have repeatedly held that when an objectionable statement is made by a prosecuting attorney, defense counsel must object and request that the jury be admonished to disregard the statement. *Tahdooahnippah v. State*, 610 P.2d 808 (Okl.Cr.App.1980). When this is not done the appellant is deemed to have waived any objection, unless the remarks are fundamentally prejudicial. *Bruner v. State*, 612 P.2d 1375 (Okl.Cr.App.1980). Because defense counsel did not object to these remarks at the time the prosecutor made them, and we find no fundamental prejudice occurred as a result, this proposition of error is without merit.

[18] Error is also alleged in various instructions given by the trial judge. It is argued that the statement in the last instruction, "Your verdict must be unanimous. Proper forms of verdict will be given you which you shall use in expressing your decision" was erroneous because it required the jury to come back with a verdict and did not explain to them that if they could not agree reasonably to a verdict they must come back with a verdict of life imprisonment. However, it is the appellant's brief and not the trial judge's instructions that incorrectly states the law. In Oklahoma, the jury in a criminal case is required to reach a unanimous verdict. See, 22 O.S. 1981, § 921. As was properly stated in Instruction No. 7, if the jury does not find unanimously beyond a reasonable doubt one or more of the statutory circumstances existed, they would not be authorized to consider the penalty of death, and the sentence would automatically be imprisonment for life. The authority for this statement is found in 21 O.S.1981, § 701.11: "If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life." Therefore no error occurred in this instruction.

The appellant also argues that the jury instructions rendered the Oklahoma Death Penalty Statute unconstitutional as applied for five reasons.

[19] In Part A of this five part argument, the appellant objects to the statement found in Instruction No. 9, "You must avoid any influence or sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." He argues that this statement nullified the court's earlier instruction to the jury concerning mitigation. We do not agree. The statement complained of is taken out of context. It is found in the final instruction to the jury which was a general instruction on the duty

of jurors. The particular paragraph in which the statement is found explained to the jurors that each must determine the importance and weight of the evidence himself and discharge his duty as a juror "impartially, conscientiously and faithfully ... and return such verdict as the evidence warrants when measured by these Instructions."

Instruction No. 6, on the other hand, clearly explained to the jurors that they were not limited in their consideration to the minimum mitigating circumstances set out by the court, but could consider any other mitigating circumstances that they found existed from the evidence. We therefore see no conflict between the two instructions.

[20] Part B of this proposition of error appears to argue that the Oklahoma statute, 21 O.S.1981, § 701.11, interpreted by this Court in *Irvin v. State*, 617 P.2d 588 (Okl.Cr.App.1980), creates an unconstitutional mandatory imposition of the death penalty once aggravating circumstances outweigh mitigating circumstances. It is not surprising that the appellant's argument is unsupported by relevant authority. It is true that the Supreme Court struck down North Carolina's death penalty statute[1] because it made the imposition of the death penalty mandatory once first-degree murder was found. On the contrary, the Oklahoma statute provides objective standards to guide the jury in its sentencing decision, the jury is not required to recommend death even if it finds that one or more aggravating circumstances have been established beyond a reasonable doubt. Similar statutory schemes have been upheld by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

It is argued in Part C that the trial judge did not adequately explain to the jury the purposes for which they were to use mitigating circumstances or how the mitigating circumstances should be weighed in relation to the aggravating circumstances. There is no indication in the record that the appellant objected to the instructions he now complains of, or offered any alternative instructions. Where such is the case, this Court deems the error waived unless the accused was deprived of a substantial right due to the failure to instruct upon a material or fundamental question of law. *Lackey v. State*, 529 P.2d 994 (Okl.Cr.App.1974). We have reviewed the instructions on mitigating and aggravating circumstances and find they were sufficient to inform the jury of their duty in deciding whether to impose a sentence of death or life imprisonment.

[21] Part D alleges that 21 O.S.1981, § 701.11 unconstitutionally shifts the burden of proof to the appellant to prove sufficient mitigating circumstances to outweigh the aggravating circumstances. We find that the statutory language requiring the defendant to come forward with evidence of mitigating circumstances does not impermissibly shift the burden of proof to the defendant in contravention of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). In the guilt stage of the trial, the jury was instructed that the burden was on the State to prove beyond a reasonable doubt every element of first degree murder. The judge also instructed in the second stage of the trial that the State was required to prove beyond a reasonable doubt at least one aggravating circumstance. Therefore, we find the appellant's contention to be without foundation.

[22] Lastly, the appellant contends that error resulted in the giving of part of Instruction No. 9 which advised the jury that they were authorized to consider all evidence presented throughout the trial in determining what sentence the defendant should receive. The argument is wholly without merit in view of the U.S. Supreme Court's clear mandate in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which authorized the sentencer, in this case the jury, to consider not only the defendant's record and character, but any circumstances of the offense

1. *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

[23] In Proposition of Error Number Fifteen, the appellant argues that insufficient evidence existed to allow the jury to find the aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. This argument lacks merit because of our previous decision in *Eddings v. State*, 616 P.2d 1159 (Okl.Cr.App.1980), remanded for resentencing ___ U.S. ___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), wherein we stated that "It is important to realize that the focus of this aggravating circumstance is on the state of mind of the murderer. It is the murderer who must have the purpose of 'avoiding or preventing a lawful arrest or prosecution.'" *Eddings v. State*, *supra*, at 1169. The evidence presented by the State in the taped telephone conversation between the appellant Clegg and Parks clearly established Parks' state of mind.[2] Therefore the jury had ample evidence on which to find the aggravating circumstance and no error occurred.

[24, 25] Lastly, the appellant contends that the Oklahoma death penalty is unconstitutional because the State has failed to show that the death penalty fulfills a compelling state interest which cannot be gratified by less drastic means and because the death penalty constitutes cruel and unusual punishment. Both of these issues have been addressed and rejected by the U.S. Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). There the court upheld the Georgia death penalty statute and in addition to finding that the death penalty did not constitute cruel and unusual punishment in violation of the Eighth Amendment, also stated that:

> We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.

In accord with the Supreme Court decisions in *Gregg v. Georgia*, *supra*, and *Proffitt v. Florida*, *supra*, we find that the Oklahoma death penalty statute is constitutional.

[26] In addition to ruling on the assignments of error that are raised, 21 O.S.1981, § 701.13, ¶ C, requires this Court to make three determinations. We have examined

2. The transcript of the telephone conversation reveals the following colloquy:

* * * * * *

James: Youdon't [sic] know nuthin.
Robin: Agh—I don't know.
James: You don't [sic] know nuthin.
Robin: I reckon.
James: Hey man, and I just found out today you didn't even get no money.
Robin: I wasn't going there to get no money.
James: You wasn't.....
Robin: I went there with a credit card I guess, credit card, you see what happened, he come up, I give him the credit card, he come out the booth to come back and look at my tag number.
James: ugh huh.
Robin: So I know then that if he get the tag number, as soon as I leave he gonna call the law.
James: Hugh.
Robin: Alright? [sic]
James: Ugh hugh.
Robin: OK, he gonna call the law. I got them guns, the dynamite and everything in my trunk, right?
James: Yea, I didn't know that.
Robin: I ain't going to get too far before they get on me (James: ugh huh.), so I said the way to do that if he don't be around then ain't nuthin he can tell them noway.

* * * * * *

Robin: No, but see, but that is what people fail to realize. See if he had of told on me, see I would have went anyway. See what I'm saying?
James: Yea.
Robin: And, I just looked at it I might as well. If I'm go, let me go for being a dumb son of a gun, you know a little funky gas credit card.

* * * * * *

James: Hey man, but see, I have just been thinking man, you got to be cool man, because I, you know, shit, the thing is that that's murder.
Robin: Yea, but, well, that is what I'm trying to get you to see, ain't no witnesses, so what?
James: Yea.
Robin: See, I'm what I'm trying to get you to see, if they, if I would have got caught red today, they can't find nobody that they can get up there and say yea, they seen me do this or seen me do that or this happen or that happen because there wasn't nobody there but me and him. See, and, I ain't got no guns, I ain't got nuthin.

the record in this case and have given careful consideration to the arguments of counsel and we hold:

1. That the sentence of death was not imposed "under the influence of passion, prejudice, or any other arbitrary factor." Section 701.13, ¶ D.

2. That the evidence does support the jury's finding of the statutory aggravating circumstance, § 701.12(5), the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

3. That the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[3]

The current death penalty statutes comply with the guidelines set out in *Gregg*. We have considered and overruled each assignment of error by the petitioner and have completed the statutorily mandated sentence review. We have searched the record for any fundamental error that might have prejudiced the petitioner and have found none. We find no other reason to disturb or modify petitioner's death sentence.

The judgment of guilt and the sentence of death are AFFIRMED.

BUSSEY and CORNISH, JJ., concur.

3. We have compared this case to all of the death penalty cases decided after the current death penalty statute became effective July 24, 1978. *Burrows v. State*, 640 P.2d 533 (Okl.Cr.App.1982); *Gaddis v. State*, unpublished opinion, Nov. 17, 1981; *Franks v. State*, 636 P.2d 961 (Okl.Cr.App.1981); *Irvin v. State*, 617 P.2d 588 (Okl.Cr.App.1980); *Hays v. State*, 617 P.2d 223 (Okl.Cr.App.1980); *Chaney v. State*, 612 P.2d 269 (Okl.Cr.App.1980); *Eddings v. State*, 616 P.2d 1159 (Okl.Cr.App.1980).

Jerry Marvin CAMPBELL and Jerry Ron Brown, Appellants,

v.

The STATE of Oklahoma, Appellee.

No. F-81-587.

Court of Criminal Appeals of Oklahoma.

Sept. 14, 1982.

Defendants were convicted in the Garfield County District Court, W. O. Green, III, J., of conspiracy to manufacture and distribute controlled dangerous substance, and they appealed. The Court of Criminal Appeals, Bussey, J., held that: (1) actions by State did not constitute entrapment, (2) judge who issued search warrant properly authorized serving of warrant during night, and (3) 25 items not named in search warrant, but seized at time of search, were properly admitted into evidence.

Affirmed.

Cornish, J., concurred in results.

1. Criminal Law ⇐37(2)

"Entrapment" occurs only when criminal conduct is product of "creative activity" of law enforcement officials.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐37(4)

Actions by State did not constitute entrapment where defendants had predisposition to commit crime.

3. Criminal Law ⇐37(3)

It is not entrapment for officers merely to furnish person opportunity to commit a crime.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBYN LEROY PARKS,	)	
	)	
Petitioner,	)	
	)	APPELLATE CASE
vs.	)	NO. F-79-3
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

PETITION FOR REHEARING

Comes now, ROBYN LEROY PARKS, petitioner in the above entitled matter by and through his attorney, First Assistant Public Defender, Robert A. Ravitz and requests this Court grant rehearing and recall its opinion of August 26, 1982 for the following reasons, which violate the Constitutions of the United States and the State of Oklahoma:

1) The sentence of death is disproportionate and excessive in light of similar cases concerning both the crime and the defendant;

2) The sentence of death is disproportionate and violates the Eighth and Fourteenth Amendments to the United States Constitution in that the jury failed to find the defendant had a probability of future acts of violence which would constitute a continuing threat to society and absent this finding, the death penalty is unconstitutionally disproportionate.

3) The death penalty as applied in the instant case, violates the Eighth and Fourteenth Amendments to the United States Constitution in that it provides no measurable standard of punishment in light of the factors found to exist and not found to exist by the jury and makes no measurable contribution to acceptable goals of punishment and is nothing more than a purposeless and needless imposition of pain and suffering;

4) This Court should re-evaluate its decision in light of its misinterpretation of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed 2d 973 (1978);

5) This Court should re-evaluate its opinion wherein this Court concluded that the Oklahoma death penalty statute did not shift the burden of proof in light of the jury instructions given by the court and this Court's interpretation of this statute in Irvin v. State, 617 P.2d 588, Okl.Cr. (1980) because this interpretation violates the Eighth and Fourteenth Amendments to the United States Constitution;

6) The Fourteenth Amendment is violated by the Court's decision creating a lesser degree of proof of corpus delicti as it applies to Murder in the First Degree as compared to Murder in the Second Degree;

7) This Court should reconsider its conclusion that the death penalty was not imposed under the influence of passion, prejudice or other arbitrary factors in light of the court's statements throughout the opinion that the defendant's counsel waived all issues by failing to raise these issues at trial. Similarly, the death penalty was imposed under the influence of passion, prejudice and other arbitrary factors because of the prejudicial closing argument of the prosecutor, and this is especially true in the instant case where only one aggravating circumstance was found.

8) This Court should reconsider the conclusion that the death penalty was not imposed under the influence of passion, prejudice and other arbitrary factors where the defendant's constitutional right to effective assistance of counsel under the Sixth Amendment, the Eighth Amendment's cruel and unusual punishment clause and the Due Process Clause of the Fourteenth Amendment is violated by counsel not effectively representing his client and preserving the record

9) This Court should reconsider whether the defendant's constitutional rights to a Murder in the Second Degree instruction was violated, both under the Due Process Clause of the Fourteenth Amendment and the Oklahoma Constitution in light of the evidence brought forth to the jury;

10) This Court should reconsider its finding that the evidence supported the jury's finding of a statutory aggravating circumstance, i.e., the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution where this Court also holds that the defendant was not denied his rights to a second degree murder instruction and explain this dichotomy, said dichotomy violating the Due Process Clause of the Fourteenth Amendment;

11) Counsel readopts all other issues found in brief in support of petitioner and requests that this Court grant rehearing and reconsider all those issues.

WHEREFORE, premises considered, petitioner respectfully requests this Court grant rehearing and alternatively, reverse and remand this case or modify petitioner's sentence to life imprisonment.

Respectfully submitted,

Robert A Ravitz

ROBERT A. RAVITZ
First Assistant Public Defender
ATTORNEY FOR ROBYN PARKS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served to the Attorney General in and for the State of Oklahoma on this 15 day of Sept., 1982.

Robert A Ravitz

ROBERT A. RAVITZ

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBYN LEROY PARKS

PETITIONER,

-vs-

THE STATE OF OKLAHOMA

RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

ROBERT A. RAVITZ
FIRST ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE

Petitioner, ROBYN LEROY PARKS, was sentenced to death for the crime of Murder in the First Degree in violation of 21 O.S. §701.7. This Court on the 26th day of August, 1982, affirmed petitioner's death sentence. Defendant filed a timely request for rehearing and asked for a slight additional time to file a brief. This brief is filed in support of petitioner's timely petition for rehearing.

PROPOSITION I

THE DEATH PENALTY AS APPLIED IN THE INSTANT CASE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IS DISPROPORTIONAL UNDER THE OKLAHOMA CONSTITUTION IN THAT IT PROVIDES NO MEASURABLE STANDARD OF PUNISHMENT IN LIGHT OF THE FACTORS FOUND TO EXIST AND NOT FOUND TO EXIST BY THE JURY AND MAKES NO MEASURABLE CONTRIBUTION TO ACCEPTABLE GOALS OF PUNISHMENT AND IT IS NOTHING MORE THAN A PURPOSELESS AND NEEDLESS IMPOSITION OF PAIN AND SUFFERING.

This assignment of error goes to points 1, 2, 3 of petitioner's petition for rehearing. Petitioner contends that this case is disproportionate and excessive in light of similar cases and should be modified pursuant to this court's statutory requirement to make sure that the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. 21 O.S. §701.13 c(3). Petitioner further contends that the absence of certain findings by the jury render the penalty of death as applied in the instant case disproportionate and excessive in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Currently, forty-eight cases have been or are currently before this Court in which the death sentence was imposed. [See Appendix One]. In only 5 cases other than the initial case, was the death penalty imposed where there was a single aggravating circumstance found by the jury. In the number of those cases, the felony was that the murder was committed for remuneration and involved a contract killing. The other two cases were reduced to life imprisonment on other grounds. See

Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980) and Odum v. State, ___P.2d___, F-79-713 (Okl.Cr. Sept. 21, 1982). This case is the only case where a finding of the murder was committed to avoid lawful arrest or prosecution was the sole ground on which to impose the death penalty. In approximately 60% of the cases, the jury determined that the individual defendant had a probability of future acts of violence that would constitute a continuing threat to society and in 65% of the cases, found the aggravating circumstance of the offense was cruel, heinous and atrocious and all but 4 cases excluding the instant case, one or the other aggravating circumstance was found. This study leaves out four cases wherein the aggravating circumstances found by the jury was not obtained. See Appendix One. A comparative study of the facts of the instant case clearly demonstrate that the sentence of death as imposed on petitioner is disproportionate.

In Jurek v. Texas, 428 U.S. 262 (1976), the United States Supreme Court discussed the Texas statute dealing with the finding of probability of future acts of violence which would constitute a continuing threat to society. In Jurek, supra, the Court read into the Texas statute the requirements that the jury weigh mitigating and aggravating circumstances, the nature of the offense whether it was cruel, heinous and atrocious, whether the murder was committed for remuneration or to avoid a lawful arrest or prosecution, whether the defendant had a prior felony involving the use or threat of violence, whether he created a great risk of death to many people and all sorts of mitigating circumstances which this Court has discussed in

numerous opinions. See generally Eddings v. State, 611 P.2d 1159 (Okl.Cr. 1980) remanded for resentencing ____ U.S. ____, 102 S.Ct. 869 (1982) and Chaney v.State, 612 P.2d 269.

Outside of Oklahoma, the only states with probability of future acts of violence which would constitute a continuing threat to society as an aggravating circumstance are Texas, Oregon and Virginia. The Oregon statute patterned after the one held constitutional in Jurek, requires the judge to make a determination whether there exists a probability the defendant would commit criminal acts of violence which would constitute a continuing threat to society. Virginia requires the jury to find that (1) the defendant had a proability of future acts of violence or alternatively that the offense was outrageously cruel, heinous or atrocious. If these are found, the jury has the option to impose death over life. All other statutes have a weighing procedure similar to the one in Oklahoma. Clearly, the purpose of a weighing procedure is to determine whether a convicted capital defendant has a probability of future acts of violence. Implicitly in the requirement of the weighing procedure is the determination noted in the prevailing opinion in Gregg v. Georgia, 428 U.S. 153, (Stewart J) that to be constitutional, the death penalty must serve one of two principal purposes; retribution and deterrence of capital crimes by perspective offenders. See also Enmund v. Florida, ___U.S. ___,102 S.Ct. 3368 (1982) at 3377. Thus, unless the death penalty serves one of these principal purposes, it is nothing more than a needless imposition of pain and suffering and hence, an unconstitutional punishment.

In the instant case, the jury concluded Robyn Parks killed the deceased with malice aforethought. However, the jury also concluded that there was no probability Robyn Parks would commit criminal acts of violence which would be a continuing threat to society. In other words, the jury weighed the factors in Robyn Parks' life and the factors involving the circumstances of the crime and concluded that at most, it was a spur of the moment killing with malice aforethought and therefore required them to conclude this aggravating circumstance did not exist. It is doubtful that deterrence as a valid alternative, is meaningful absent a probability of future acts of violence on the part of an offender. Counsel knows of no studies that show deterrence available in the situation as found by the jury in the instant case. See generally, Enmund v. Florida, ___U.S. ___, 102 S.Ct. 3368 (1982).

Similarly, while retribution is a valid justification for executing some capital defendants, it is necessary to look to whom you are executing. (1) You are executing a person who killed in the spur of the moment; (2) who does not have a probability of future acts of violence which would constitute a continuing threat to society; and (3) who did not kill in a cruel, heinous or atrocious way. Clearly, if retribution applies to Robyn Parks, it applies to all people who commit First Degree Murder and there is not a meaningful basis to distinquish Robyn Parks from a whole host of others who have killed and have not received the death penalty. Gardner v. Florida, 430 U.S. 349. See also Godfrey v. Georgia, 100 S.Ct.

1759 (1980).

In conclusion, the death penalty as applied in the State of Oklahoma has almost universally required a finding that the offense was cruel, heinous or atrocious or there existed a probability of future acts of violence which would constitute a continuing threat to society. [See Appendix One setting out all Oklahoma cases dealing with the death penalty]. Obviously, the intent of the Oklahoma Legislature was in determining whether mitigating circumstances outweighed aggravating circumstances, was to determine whether factors about the individual and the crime, justify the imposition of the death penalty. Absent findings on cruel, heinous and atrocious or probability of future acts of violence which the Supreme Court of the United States in Jurek, supra, has determined to be the critical factor in making these comparisons, the death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution and 21 O.S. 701.7 et. seq. Petitioner's sentence should be modified to life imprisonment.

PROPOSITION II

THIS COURT'S OPINION VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY REQUIRING AN EASIER STANDARD OF PROOF TO PROVE THE CORPUS DELICTI OF ONE DEGREE OF HOMICIDE THAN OF ANOTHER.

The United States Supreme Court in Beck v. Alabama, 447 U.S. 625 (1980) required under the due process clause the same considerations in the trial stage of a capital sentencing proceeding as in the sentencing scheme. The court stated:

> "To ensure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case."

When this Court creates a different and easier standard of proving the corpus delicti in a First Degree Murder case than in a Second Degree Murder case, it falls under the same constitutional invalidity as the prohibition against lesser included offenses in Beck, supra.

Absent the admission of petitioner, the evidence of the individual crime was a homicide which according to the medical examiner, was unnatural and was the result of bullet wounds. No evidence of the necessary element of First Degree Murder, i.e., malice aforethought, existed as a result of the death itself. Counsel concedes that malice aforethought subsequently

existed if petitioner's admissions are to be considered by the jury. This is no different however than the necessary corpus delicti of Murder in the Second Degree. What this Court has done is say that to prove a corpus delicti for Murder in the First Degree, you can eliminate the necessary element of malice aforethought. However, to prove the corpus delicti of Murder in the Second Degree, you need to demonstrate independent of petitioner's admissions, the crime of using a bogus credit card. This dichotomy makes absolutely no sense in the current status of Oklahoma law regarding corpus delicti as properly ennunciated by this Court in petitioner's opinion regarding petitioner's allegation that the element of malice aforethought was not shown as necessarily required to prove the corpus delicti to Murder in the First Degree.

Mullaney v. Wilbur, 421 U.S. 684 (1975), prohibits the assessment and the imputation of an element of a crime to prove the crime itself. According to the Court's opinion, corpus delicti means something different for Murder in the First Degree, than Murder in the Second Degree. To do this, the Court must impute malice to the defendant in violation of the Fourteenth Amendment.

This Court has created a catch twenty-two in its attempt to circumvent the clear requirement that the defendant should have been given a Second Degree Murder instruction in this case. This Court will be faced in the future with numerous cases involving Second Degree Murder charges and in those case, this Court is going to have to ennunciate a different standard for corpus delicti than it required in denying petitioner his

constitutional rights under the Oklahoma and United States Constitutions to a Second Degree Murder instruction in this case. This Court should recall petitioner's opinion because of the constitutional violation in establishing different criteria for corpus delicti or alternatively, recall this opinion because malice has been imputed to the petitioner by virtue of this Court's opinion and differential on corpus delicti.

PROPOSITION III

THIS COURT SHOULD RECONSIDER WHETHER THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A MURDER IN THE SECOND DEGREE INSTRUCTION WERE VIOLATED BOTH UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE OKLAHOMA CONSTITUTION IN LIGHT OF THE EVIDENCE BROUGHT FORTH TO THE JURY.

The petitioner does not dispute the court's statement that the requirement under federal constitutional law that a defendant is entitled to have an instruction on a lesser included offense where the evidence warrants it. Beck v. Alabama, 447 U.S. 625. This Court concluded as a matter of law that there was insufficient evidence to support the instruction on Murder in the Second Degree. This Court's interpretation is at odds with the definition of corpus delicti as discussed previously in Proposition No. II and is at odds with the evidence, facts and arguments made in the instant case.

As this Court's opinion itself shows other evidence was shown by the State which when taken in a light most favorable to the defendant, clearly shows that a Murder in the Second Degree instruction was applicable. The victim, Abdulah Ibrahim was found shot to death on the floor of a Gulf Service Station where he was employed. An unused charge slip bearing various notations on both the front and back apparently used as a scratchpad to compute customer's purchases and figure tax was found at the scene of the homicide by an investigating police officer. This same charge slip also had a license tag written across the front of it, XZ 5710 which was determined to belong to Robyn Parks (OP p. 1) Further, the evidence shown to the jury failed to demonstrate that any money had been taken during

the commission of this homicide. Further, petitioner in his initial brief before the appellate court, discusses the evidence regarding a telephone conversation between the petitioner and James Clegg which is transcribed in court's exhibit no. 1 wherein the defendant over and over again stated that he went there with a credit card and he felt that after the deceased got the tag number, he was going to call the law. A complete quotation of the statements and admissions found in court's exhibit no. 1 is located in petitioner's original brief before the Oklahoma Court of Criminal Appeals, P. 18, 19.

Later in the conversation between Robyn Parks and informant James Clegg, Robyn Parks stated:

> "I didn't take a dime. You know cause I didn't come there to take no dime, I come there to get me some gas, then when he got my number I said man, if I leave, I says I won't get two blocks before they would be on me because he gonna tell it that I got, you know a hot credit, gas credit card."

The prosecutor thereafter throughout his closing argument, stresses the factors which demonstrate murder in the second degree.

> "Now here is the way I view this evidence...I put gasoline in my car. I walk up to a window similar to this. I lay my card down. The attendent takes it. They got a little machine there. The attendent puts this card on the machine, and then the credit card on there and pull that roller over it and back and hands me my card back and then they lay this slip here in front of me, and I signed it. Then I turn and walk away. What they do with the slip, I don't have any idea. In the meantime though, they have either asked me my number and set it down, or as they hand me the slip, would you write your tag

number down on this slip here...But let's say at that point as I am walking away I haven't set my tag number down or they haven't asked me for it and they need to put it on there. I would visualize and circumstantially under this evidence that as that card lay on this ledge here where I have signed it, that part of it, in the meantime they have torn the top sheet off, you know, and given it to me, and I am walking away with it and I am back at my car, and the attendent has it there and he realizes he doesn't have a tag number. I don't even know, I can't even feel that at that point he was really suspicious that this was a stolen credit he had used. The defendant knew it. But did Mr. Ibrahim knew it? But anyway he needed a tag number on this slip there...you visualize it and interpret it anyway you want to. This is just mine and don't yield your views for mine. For goodness sake don't do that. I visualize that this slip that the defendant had signed was laying right here on this counter. That Mr. Ibrahim goes over and unlocks his door and goes around so that he could see the car. You see, from the islands and him in this little hut thing, the booth, there is no way in the world he could see the tag number of every car that is bought gas there. So now then, he has walked out of his booth, and the only person would know he walked out of his booth was whoever did the killing. The killer, see, would know that he had walked out of this booth, and was apparently setting down his tag number. And I think that is exactly what happened because there is no way you could get that door unlocked as it was when the police got there except for Mr. Ibrahim to walk out there...so anyway, here is this, I am just using this as a hypothetical example and here is this slip that is laying right here on the ledge. Mr. Ibrahim will walk out of there and he has got the tag number and he is going to come back in, he's going to come back in and he is going to transpose it on this charge slip. So as Mr. Ibrahim has got the tag number and he is going to come back and put it on this slip that's been filled out, by that time Robyn knew what was happening, and knew

that his tag number was being taken down, and he knew that he had better do somethng about it. He comes back up there and takes this gun here, he has it cocked, and he has got six shells in there and he points it through this window here, and fires it into the body of Mr. Ibrahim. Now the credit slip he signed is right here. Sure he is going to take that, isn't he? Because that is the evidence of the stolen credit card. He doesn't know but what when Mr. Ibrahim was setting down the tag number but what he was putting it on the charge slip that's laying on the ledge right here. He doesn't know that..." (Tr p. 621-623).

Thereafter the district attorney continues:

MR. McKINNEY: "That's right. That's my inference on it. If yours disagrees with mine, you stick with yours.

And, that then the defendant himself then removed the filled-in credit slip; and he doesn't know that right on the other side here, right as this drops down here, and out of his sight as he's standing there, is this one that does have the actual tag number on it. And I suggest to you that's what happened to the charge slip where this defendant did purchase the gasoline with a hot credit card. But Mr. Hood suggests, why didn't he take the slip which had his tag number on it; and I present to you that I think he did think he was taking it when he took the one that had been filled in with the use of the credit card.

And he says that the defendant would not have gone up to the booth with the stolen credit card. Well, the defendant himself tells you he did. He just flat told you that he did. You heard him as he said it. That's what he said he did. Well, you know, there would have been more risk of him being caught in a hurry if he drives up there and he fills his tank up with gas and then he just drives off without paying for it. You know good and well that within just a short time the police would be after him then. But by using a stolen credit card--particularly if he hadn't given the attendant his tag

> number--why, there would be probably no likelihood at all that he would ever be apprehended on it, so why wouldn't he have used the credit card in preference to driving away without paying for it. And Mr. Hood would say--did say to you, he says, I don't think a credit card had anything to do with the death. Well, you heard it from the lips of the defendant himself as he talked on the telephone, that the reason the killing took place was Mr. Ibrahim had took down his tag number and that was the reason for the killing; and Mr. Hood would tell you that there was no apparent reason. I say the apparent reason just stands out just as loud as it can stand out and telling you."

It is clear from this argument, the prosecutor's theory of the case was the petitioner killed while using a fraudulent credit card. It is inconceivable to petitioner in light of this argument and this evidence, how a murder in the second degree instruction was not warranted. This Court brushes this contention aside on the theory that the State had not proven the corpus delicti for the murder in the second degree. This Court then cites DeLaune v. State, 569 P.2d 463 (Okl.Cr. 1977) to support the fact that the trial court was justified in not giving a second degree murder instruction. This Court misunderstands the meaning of DeLaune. In DeLaune, supra, this Court was faced with a contention that the State had failed to prove the defendant's crime of embezzeling state funds independent of his confession and stated that the facts of that case did not so establish. This Court misinterprets the difference between the petitioner's admissions made during the commission of the phone conversation with informant Clegg and what is commonly referred to as a confession. This Court on numerous occasions, has established that before an admission is

to be a confession, the defendant must be in custody and absence a showing of custody, there is no requirement that an admission provide for the same Miranda Rights as a confession and counsel knows of no case that this Court has stated an admission is not the admissible to prove the corpus delicti of *a crime.*

What this Court has done in essence, is state in this opinion, that the State of Oklahoma can not prove the corpus delicti of a crime by the use of admissions outside any other evidence. This is contrary to law and will have a direct result of nullifying all future criminal acts where an admission is used to establish a corpus delicti.

Counsel also calls the court's attention to what is the corpus delicti in a second degree murder case. The corpus delicti is the body of the crime itself and this court has held in Bond v. State, 90 Okl.Cr. 110, 210 P.2d 784 (1949) that corpus delicti means the actual commission of a particular crime by someone. Clearly, the showing of a death by the use of a gun is sufficient to establish corpus delicti. This Court should reconsider its holding in light of the evidence presented to the jury.

PROPOSITION IV

THIS COURT SHOULD RECONSIDER ITS FINDING THAT THE EVIDENCE SUPPORTED THE JURY'S FINDING OF A STATUTORY AGGRAVATING CIRCUMSTANCE, THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR PROSECUTION, WHERE THIS COURT ALSO HOLDS THE DEFENDANT WAS NOT DENIED HIS RIGHT TO A SECOND DEGREE MURDER INSTRUCTION AND EXPLAIN THIS DICHOTOMY, SAID DICHOTOMY VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This Court has consistently held that the State must bear the burden of proof in proving aggravating circumstances and that that burden is on the State to prove the circumstance beyond a reasonable doubt. Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980). In the instant case, this Court in its opinion, fails to explain the inconsistency in initially stating that petitioner was not entitled to a Murder in the Second Degree instruction and then concluding that the evidence supported the aggravating circumstance that the defendant committed the murder to escape lawful arrest or prosecution beyond a reasonable doubt. It is not necessary to be entitled to a Murder in the Second Degree instruction that the elements of Murder in the Second Degree be proven beyond a reasonable doubt to the trial court or to the appellate court. See Beck, supra. It is necessary before a jury can find an aggravating circumstance that they determine that it exists beyond a reasonable doubt. 21 O.S. §701.11. Similarly, before this court can affirm a death sentence, they must determine whether the evidence supports the jury's finding of the stautory aggravating circumstance. 21 O.S. 701.13.

This Court concluded that the aggravating circumstance was found beyond a reasonable doubt as a result of the evidence the State presented regarding the taped telephone conversation and that this conversation clearly established Parks' state of mind that he committed the murder for the purpose of avoiding or preventing a lawful arrest or prosecution. Footnote 2 to the Court's opinion reveals the telephone conversation which is exactly the same taped telephone conversation petitioner argued on direct appeal as the basis to establish the state of mind of using a credit card as the basis for a Murder in the Second Degree instruction. This Court did not in its initial opinion, explain the two inconsistencies and it is doubtful that these inconsistencies can be explained away.

PROPOSITION V

THIS COURT SHOULD RE-EVALUATE ITS DECISION IN LIGHT OF ITS MISINTERPRETATION OF LOCKETT V. OHIO, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed 2d 973 (1978).

On petitioner's direct appeal to this Court, he argued that the giving of instruction no. 9 in the penalty stage which advised the jury that they were authorized to consider all evidence presented throughout the trial in determining what sentence the defendant should receive was improper. This Court stated that this argument was wholly without merit citing Lockett, supra. The court thereafter stated:

> "Lockett authorized the sentencer in this case, the jury, to consider not only the defendant's record and character but any circumstances of the offense."

The court either misinterpreted counsel's argument or misinterprets the Supreme Court's mandate in Lockett, supra.

At the time of the United States Supreme Court decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed 2d 2346 (1971), the Supreme Court was faced with numerous capital sentencing statutes which provided uncontrolled discretion. In Furman, supra, the court held that the infliction of the death penalty could not be imposed under a sentencing procedure that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. "The Eighth and Fourteenth Amendments cannot tolerate the infliction of the sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." 408 U.S. at 309-310. [Stewart J. concurring]. The United States Supreme Court

further stated in Gregg v. Georgia, 428 U.S. 153 (1976):

> " Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

Counsel's argument is not based on what is a legitimate mitigating circumstance but what factors the jury is considering in arriving at a determination that the mitigating circumstances do not outweigh the aggravating circumstances. Any factor which is not aggravating cannot be used as a basis to impose the death penalty. However, an instruction such as the one given in the instant case, allows the jury to consider any factor it so chooses in giving the death penalty. The court's reliance on Lockett, supra, is totally misplaced. Lockett dealt with the situation wherein the fact finder in the sentencing stage of a capital case in Ohio, was precluded from considering certain mitigating circumstances. The United States Supreme Court held that the sentencer in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record in any of the circumstances of the offense that the defendant pro offers as a basis for a sentence less than death. 98 S.Ct. at 2965. Lockett does not deal with the situation where a sentencer is allowed to use any factor it desires to give the death penalty. The proper instruction should be that the jury is allowed to consider all evidence presented throughout the trial which relate to a statutory aggravating circumstance or anything in mitigation in

determining what sentence the defendant should receive. The type of instruction given in the instant case, failed to give the individualized consideration required in capital cases and did not control discretion as required by the Eighth and Fourteenth Amendments to the United States Constitution. Gregg, supra. See also Gardner v. Florida, 430 U.S. 349 and Eddings v. Oklahoma, 447 U.S. ____ 102 S.Ct. 869 (1982).

PROPOSITION VI

THE DEATH PENALTY WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE AND OTHER ARBITRARY FACTORS.

In the instant case only one aggravating circumstance, the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution was found by the jury. Counsel in proposition number I, demonstrates that in well over 85% of the capital cases, the finding of just one aggravating circumstance does not usually amount to a death verdict and absent a finding of either probability of future acts of violence which would constitute a continuing threat to society or that the offense was cruel, heinous and atrocious, the death penalty is rarely handed out. Counsel knows of no other capital case in Oklahoma wherein the sole finding of this aggravating circumstance rendered a death penalty verdict. Despite this, this Court concluded that the death penalty was not imposed under the influence of passion, prejudice or other arbitrary factors. Counsel contends that the arbitrary factor that this Court failed to look at was competency of counsel./1

1/ At present the record may not conclusively demonstrate constitutionally ineffective assistance of counsel under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the law on competency of counsel as stated by this Court in Johnson v. State, 620 P.2d 1311 (Okl.Cr. 1980) and absent a post-conviction evidentiary hearing, appellate counsel does not believe he can properly litigate the competency of counsel issue inasmuch as medical records of the attorney who tried the case and the physical condition of the attorney who tried this case and other factors need to be thoroughly developed at an evidentiary hearing.

While the factors necessary for a finding of a violation of petitioner's rights to effective assistance of counsel have not yet been developed and are better left for a post-conviction hearing, the petitioner contends that the facts of the instant case demonstrate that the arbitrary factor of counsel's ability and the failure to object to a totally improper closing argument requires nullification of the death sentence.

The prosecutor's improper closing argument which this Court does not consider by stating it was waived by defense counsel's failure to object, contained argument after argument which this Court has deemed prejudicial in other cases. See generally Hager v. State, 612 P.2d 1369 (Okl.Cr. 1980) reversing a death penalty and Brewer v. State, ___P.2d____ (Okl.Cr. 1982). The instances of prosecutorial misconduct in the instant case which may be considered arbitrary factors which clearly could have given the defendant the death penalty especially in light of simply one aggravating circumstance being found intially appears in the prosecutor stating his personal opinion regarding the facts of the case. (Tr p. 704-705) (Petitioner's brief p. 79). Thereafter, the prosecutor continued to downgrade the jurors' role and minimized their responsibility in assessing the death penalty. (Tr p. 707) Thereafter, counsel ridicules the defense counsel's closing argument and states his personal opinion that he had secured the death penalty in eight cases and over 50% of the cases, the defendants were white. (This argument can be found on page 81-82 of petitioner's original brief). Not satisifed, the prosecutor then goes on and conveniently talks about the

deterrent effect of the death penalty for approximately two pages of the transcript (Tr p. 726, 727) [These comments may be found verbatim in petitioner's original brief, page 83].

Petitioner contends that in light of the extremely prejudicial closing argument, in light of this court's unwillingness to address this closing argument by stating the errors were waived by counsel's failure to object and in light of the fact that past arguments consisting of the same arguments have been repeatedly condemned by this Court and finally in light of the fact that only one aggravating circumstance was found, counsel contends that the arbitrary factor of ability of petitioner's counsel denied him his rights to an effective representation at the very least in the penalty phase.

It is therefore respectfully requested that this court should grant rehearing and hold as a matter of law that there were arbitrary factors regarding the prosecutor's closing argument which calls for modification of this case.

CONCLUSION

This Court should recall its opinion of August 26, 1982 affirming petitioner's sentence of death in light of the aforementioned arguments and alternatively, reverse and remand this case for imposition of sentence for Murder in the Second Degree or modify this sentence to life imprisonment for Murder in the First Degree based on proportionality of sentencing and inconsistencies between the finding of the aggravating circumstance and the failure to give a Murder in the Second Degree instruction.

Respectfully submitted,

Robert A Ravitz

ROBERT A. RAVITZ
First Assistant Public Defender
ATTORNEY FOR PETITIONER
ROBYN LEROY PARKS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served this 23rd day of September, 1982 to the Attorney General in and for the State of Oklahoma.

Robert A Ravitz

ROBERT A. RAVITZ

(APPENDIX ONE)

TABLE OF AGGRAVATING CIRCUMSTANCES

FOUND IN DEATH PENALTY CASES

FROM 1977 to SEPT. 23, 1982

(Pending and Decided)

NOTE: Information for these statistics came from either the original record or the trial judges report on file at the Court of Criminal Appeals, unless otherwise noted.

NAME	CRUEL-HEINOUS	GREAT RISK	PROBA-BILITY	PRIOR FELONY	LAWFUL ARREST	PRISONER	REMUN-ERATION	MUR PEN OFF eff May 198
BROGIE, Kirk Wayne/1 F-80-553								
BANKS, Anthony R. F-81-179		x	x	x				
WHITE, James William F-81-384	x	x						
PARKER, Danny George F-81-997	x		x	x		x		
GREEN, Michael Wayne F-81-798	x		x	x		x		
KELLY, Ronald D. F-82-309	x		x				x	
JOHNSON, Malcolm Rent F-82-312			x	x				
MORGAN, Carl Shelton F-79-487			x	x				
COLEMAN, Charles Troy F-79-600	x	x	x	x	x			
BINSZ, Michelle Ann F-79-692							x	
BINSZ, Steven Wm. F-79-693							x	
STAFFORD, Roger Dale F-80-256	x	x	x		x/2			
AKE, Glen Burton F-80-523	x		x		x			
BOWEN, Clifford H. F-81-315	x	x			x			
DAVIS, James Douglas F-82-232	x		x					
BROADRICK, Thomas E. F-82-344			x	x				
DAVIS, Charles F-78-140, F-78-141	x	x		x				
BOUTWELL, JOHN F-78-342	x				x			
JONES, D.L. - affirmed F-80-509	x	x						
ODUM, Huey Don F-79-713	x							
COX, Venory Reversed on other grounds		x	x					
IRVIN, Warner /3 Modified on other grounds 617 P.2d 588	x							
FRANKS, Alton Carol Modified on other grounds 636 P.2d 361		x	x	x				

NAME	CRUEL-HEINOUS	GREAT RISK	PROBA-BILITY	PRIOR FELONY	LAWFUL ARREST	PRISONER	REMUN-ERATION	M F G e 1
JOHNSON, Kenneth F-80-100			x		x		x	
TOBLER, Mark Hamilton F-82-304		x	x					
HALL, Edward F-79-723	x			x		x		
COLEMAN, Charles Troy F-80-150				x				
HATCH, Steven Keith /4 F-80-302	x		x		x			
STOUT, Billy Gene /6 F-80-470								
ROBISON, Olan Randle /4 F-81-388	x/5	x	x	x				
HAYES, Roger Dale /6 F-82-466								
DRISKELL, Clifton D. /4 F-77-603	x		x					
SMITH, Larry Dean /4 F-78-331	x							
GLIDEWELL, Robert E. F-78-487					x		x	
JONES, Wm. Denton /4 F-78-604	x		x					
STAFFORD, Roger Dale /4 F-79-722	x	x	x		x			
MUNN, Anthony Ray F-81-350	x		x					
FISCHER, Joseph James /6 C-81-448								
HAYES, Thomas /3 Affirmed - 617 P.2d 223	x	x	x					
CHANEY, Larry Leon /3 Affirmed - 612 P.2d 269	x	x			x		x	
EDDINGS, Monte /3 Affirmed - 616 P.2d 1154 remanded on other grounds 457 ___U.S.___	x		x		x			
BREWER, Benjamin /4 F-79-609 Reversed on other grounds	x			x				
WILLIAMS, Levi F-80-93 Killed in penitentiary		x	x					
DUTTON, Lonnie Joe F-79-337		x	x					

NAME	CRUEL-HEINOUS	GREAT RISK	PROBABILITY	PRIOR FELONY	LAWFUL ARREST	PRISONER	REMUNERATION	MI PE OF ef Ma 19
BURROWS, William Modified on other grounds	x	x						
HAGER, Richard Reversed on other grounds 612 P.2d 1369	x		x					
PARKS, Robyn LeRoy F-79-3					x			

1/ The trial judge's report shows the court instructed that the crime was especially heinous atrocious and cruel, but shows that no aggravating circumstances were found. Appellate counsel was unavailable for clarification.

2/ Found on two of the three counts alleged.

3/ The aggravating circumstances listed were taken from the opinion of the Court of Criminal Appeals.

4/ The original record and trial judge's report were unavailable at the Court of Criminal Appeals and the information was provided by appellate counsel.

5/ Found on only one of three counts alleged.

6/ The original record and trial judge's report were unavailable at the Court of Criminal Appeals and appellant's counsel either was unavailable or did not respond to inquiry.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBYN LEROY PARKS, Appellant,	)	
-vs-	)	No. F-79-3
THE STATE OF OKLAHOMA, Appellee.	)	

ORDER DENYING PETITION FOR REHEARING

The appellant filed his petition for rehearing in the above styled and numbered appeal on September 15, 1982, from his conviction in Oklahoma County, Case No. CRF-77-3159.

NOW THEREFORE, after considering the petition for rehearing and after reviewing the record, this Court finds that the petition for rehearing should be DENIED. The Clerk of this Court is directed to issue the mandate in this cause FORTHWITH.

IT IS SO ORDERED.

WITNESS OUR HANDS and the Seal of this Court this 28th day of September, 1982.

Tom Brett
TOM BRETT, PRESIDING JUDGE

Hez J. Bussey
HEZ J. BUSSEY, JUDGE

Tom R. Cornish
TOM R. CORNISH, JUDGE

ATTEST:

Ross N. Lillard Jr.
Clerk